

FEDERAL CIRCUIT COURT OF AUSTRALIA

TOOR v MINISTER FOR IMMIGRATION & ANOR [2016] FCCA 3318

Catchwords:

MIGRATION – Application for judicial review of a decision of the Administrative Appeals Tribunal.

Legislation:

Migration Act 1958 (Cth), ss.5, 474

Migration Regulations 1994 (Cth), cl.457.224(1)

Cases cited:

Minister for Immigration and Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259

Applicant:	GAURAVMEET SINGH TOOR
First Respondent:	MINISTER FOR IMMIGRATION & BORDER PROTECTION
Second Respondent:	ADMINISTRATIVE APPEALS TRIBUNAL
File Number:	BRG 519 of 2015
Judgment of:	Judge Howard
Hearing date:	27 October 2016
Date of Last Submission:	27 October 2016
Delivered at:	Brisbane
Delivered on:	27 October 2016

REPRESENTATION

The Applicant appeared in person

Counsel for the First Respondent: Mr McGlade

Solicitors for the First Respondent: Sparke Helmore

ORDERS

- (1) That the application filed on 11 June 2015 be dismissed.
- (2) That the APPLICANT pay the costs of the FIRST RESPONDENT fixed in the amount of \$7,206.00.

FEDERAL CIRCUIT COURT

OF AUSTRALIA

AT BRISBANE

BRG 519 of 2015

GAURAVMEET SINGH TOOR

Applicant

And

MINISTER FOR IMMIGRATION & BORDER PROTECTION

First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL

Second Respondent

EX TEMPORE

REASONS FOR JUDGMENT

A. These reasons were delivered ex tempore on 27 October 2016 and have been settled and corrected for grammatical errors in order to convey the precise intention of the Court.

1. This is an application for judicial review. The application was filed on 11 June 2015. By way of background, the applicant had applied for a visa on 13 March 2014.
2. The applicant applied for what is known as a temporary business entry class UC, known as a subclass 457 visa. These are for skilled overseas workers to work in Australia in skilled occupations. One of the criteria

for obtaining such a visa – noted in clause 457.224 subsection (1) to schedule 2 of the *Migration Regulations 1994* (Cth), is that the applicant has to satisfy what is known as public interest criteria 4020.

3. Public interest criteria 4020 states, relevantly, as follows:-

“4020

(1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5-reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:

(a) the application for the visa; or

(b) a visa that the applicant held in the period of 12 months before the application was made.

(2) The Minister is satisfied that during the period:

(a) starting 3 years before the application was made; and

(b) ending when the Minister makes a decision to grant or refuse to grant the visa;

the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).

(2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.

(2A) The applicant satisfies the Minister as to the applicant's identity.

(2B) The Minister is satisfied that during the period:

(a) starting 10 years before the application was made; and

(b) ending when the Minister makes a decision to grant or refuse to grant the visa;

neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).

(2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.

(3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.

(4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:

(a) compelling circumstances that affect the interests of Australia; or

(b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;

justify the granting of the visa.

(5) In this clause:

information that is false or misleading in a material particular means information that is:

(a) false or misleading at the time it is given; and

(b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.”

4. Subsection (1) of the public interest criteria is of particular relevance. The criteria that needs to be satisfied is that – there is no evidence before the Minister that the applicant has given or cause to be given a bogus document or information that is false or misleading.
5. After the applicant made the application for a visa on 13 March 2014 the matter went before a delegate of the Minister. The delegate rejected the visa application because the delegate was not satisfied that the criteria, as stated in public interest criteria 4020 subsection (1) had been satisfied.
6. It's important to note that the term “bogus document” is, in fact, defined in section 5 of the *Migration Act 1958*:-

“5 Interpretation

(1) In this Act, unless the contrary appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

(a) purports to have been, but was not, issued in respect of the person; or

(b) is counterfeit or has been altered by a person who does not have authority to do so; or

(c) was obtained because of a false or misleading statement, whether or not made knowingly.”

7. The delegate having rejected the visa application, the applicant then applied to the Tribunal for a review of the delegate’s decision. That application was filed on 21 July 2014. On 10 April 2015 the applicant himself appeared before the Tribunal with his migration representative in order to give evidence and to present arguments.
8. The Tribunal, on 14 May 2015, affirmed the delegate’s decision. On 11 June 2015 the applicant filed an application in the Federal Circuit Court of Australia seeking judicial review of the decision of the Tribunal.
9. In the actual decision of the Tribunal there are several points that need to be noted. In the court book as pages 13 and 14 there is a document – a letter, in fact – which is said to be signed by a ***“Sandeep Singh, Director and Operator”***. The letterhead reads, ***“Chawla’s since 1960”***. And it sets out, in essence, a reference in relation to the applicant.
10. As part of the particular process involved, and in order to determine whether the criteria – the public interest criteria 4020 had been met, an integrity officer contacted “Chawla’s” in India. The integrity officer ascertained that the applicant had worked for Chawla’s for two years, not for three years as the letter contained in paragraph – at page 13 of the court book says.

11. The Tribunal points out that there were other inconsistencies in the applicant's evidence, including the start date of his employment with "Chawla's". On one occasion it is noted that he had said he had started employment in mid-2012. On another occasion, he had said that he had started employment in January 2011.
12. The letter that I've referred to at pages 13 and 14 (of the court book) refers to the fact that the applicant was a restaurant manager for three years. At the hearing itself there was a further issue noted by the Tribunal – when the applicant told the Tribunal that, in fact, the three years as a restaurant manager wasn't true.
13. He had done a year as a trainee and then two years as a manager. The integrity officer, when investigating the question of whether the public interest criteria 4020 had been met, had also spoken to Mr Sandeep Singh in India about the duties which the applicant had apparently undertaken at Chawla's.
14. And according to the integrity officer – the response was that Mr Toor had carried out cash counter duties only. This was noted as a matter of concern because the reference at pages 13 and 14 of the court book refers to significantly more duties than merely cash counter duties.
15. And in addition, the Tribunal was concerned that the information obtained, or ascertained, by the integrity officer revealed that "Chawla's" itself was only a relatively minor operation, employing 8 or 9 employees, and that the owner himself – it was ascertained by the integrity officer – the duties which are set out essentially in the letter. It's probably the second main paragraph on page 13 of the court book. That is the reference from Chawla's.
16. One paragraph of the letter on page 13 of the court book states:-

"Monitor purchasing, storage preparation, cooking, handling, and additionally serving all food beverage products to make sure correct recipe portion and additionally specification standards."
17. There was some concern about that paragraph in particular. And, of course, it is said that it was felt, at least, that that was implausible. The applicant at the time was only aged 19 years and paragraph 23 of the

Tribunal's decision notes that the Tribunal had asked the applicant if he had any cooking skills, experience or qualifications. And the applicant denied that he had cooking skills, experience or qualifications.

18. Paragraph 23 of the Tribunal's decision states in its entirety:–

“23. The Tribunal asked the applicant if he had any cooking skills, experience or qualifications which he denied. The Tribunal noted that the work reference claims that he monitored the cooking, and the use of recipes at the restaurant. It asked how he was able to do that if he had no cooking skills, qualifications or experience. He said that, in the first year, when he was at university and working only part-time, he would look at how the food was being prepared. The Tribunal considers this evidence to be particularly unpersuasive. It does not accept that the applicant, as a 19 year old without relevant work experience, had the skills to monitor the cooking and use of recipes as claimed in the work reference. It considers this claim to be fabricated.”

19. Of particular note is the final sentence in paragraph 23, that the Tribunal considered the claim to be fabricated.
20. All of the concerns raised by the Tribunal were, indeed, put to the applicant but the Tribunal was not satisfied with the veracity of the responses or the plausibility of them, essentially. The Tribunal also noted that other letters of recommendation, as it were, or confirmation, which are those which appear at pages 65 to 71 of the court book – whilst they appear on their face all to be businesses apparently in or near the area of “Chawla’s” business in India – what was noted with some concern by the Tribunal was the fact the content of each letter appeared quite similar.
21. And so this was put to the applicant and the applicant admitted, as he has in Court today, that he did actually draft the content. He said today in Court that was because they asked him to do it. The biggest problem for the applicant in this particular matter which is now before this Court – is that the Tribunal rejected his assertions in relation to the matters to which I have referred and I note in particular what is stated in the Tribunal decision from paragraphs 25 through to 29 inclusive, all of which will be included here in the reasons for judgment:–

“25. The Tribunal noted that many of the references, provided to the Department after the applicant was given an opportunity to comment on the outcome of the integrity checks, are virtually the same in content and layout. The Tribunal raised its concern that this may lead the Tribunal to question whether these references are reliable. The applicant admitted to the Tribunal that he asked those businesses to help him and he prepared the documents for the alleged authors to sign. In circumstances where the applicant has actually prepared these references himself the Tribunal gives the references little weight.

26. The Tribunal explained to the applicant that it may find he has given, or caused to be given information that is false or misleading in a material particular. It explained that it may find the work reference is a bogus document and provided the relevant definitions. The applicant asserted that he really did undertake all of the duties set out in the work reference, after he underwent the training.

27. Having considered all of the documentary and oral evidence in its entirety the Tribunal is not satisfied the applicant was the restaurant manager at Chawla Chicken in the period January 2010 to January 2013, undertaking the duties set out in the work reference said to be from the Director, Chawla Chicken. Due to the concerns discussed about, having considered all the evidence, the Tribunal is of the view that if the applicant did in fact work at Chawla Chicken in the period claimed, he merely managed the cash counter as initially asserted by the reference when he was interviewed by the Department.

Has the visa applicant provided a bogus document?

28. The Tribunal has considered the definition of bogus document as set out in s.5(1) of the Act. The Tribunal considers that the requirement in PIC 4020, when read in conjunction with s.5(1), is that there is no evidence before the Minister or the Tribunal that the applicant has given, or caused to be given to the Minister, an officer, the Migration Review Tribunal, a relevant assessing authority or a Medical Officer of the Commonwealth, a document that the Minister, or Tribunal on review, reasonably suspects is a document that is counterfeit. ‘Counterfeit’ is not a defined term so the Tribunal has considered the ordinary meaning of the word. In doing so it considered the (on-line) Macquarie Dictionary definition which includes pretended, an imitation designed to pass as an original, a forgery, to resemble and to simulate, not genuine. The (on-line) Oxford Dictionary includes made in the exact

imitation of something valuable with the intention to deceive or defraud, and pretended or sham.

29. The Tribunal has found that it is not satisfied the applicant worked as a restaurant manager in the period January 2010 to January 2013, undertaking the duties set out in the work reference said to be from the Director, Chawla Chicken. The Tribunal does not accept that the applicant undertook the duties as purported in the work reference. It reasonably suspects therefore that the work reference provided with the visa application to the Department, is a counterfeit document, that is, it is a sham document and not genuine, because it has been prepared with the intention to deceive the Department. The Tribunal finds that the work reference was provided to intentionally mislead the Department into believing that the applicant had the skills and employment background for the occupation of Café or Restaurant Manager. The Tribunal finds, therefore, that the work reference is a bogus document within the meaning of s.5(1) of the Act. Accordingly, the Tribunal finds that there is evidence that the applicant has given or caused to be given, to the Minister, or an officer, a bogus document in relation to the application for the visa. The Tribunal finds, therefore, that the visa applicant does not meet PIC 4020(1)."

22. I note that the Tribunal in paragraph 27 made the point that, having considered all of the documentary evidence, the Tribunal was not satisfied that the applicant was the restaurant manager at the "Chawla's" in the period January 2010 to January 2013. Of particular note also is paragraph 29 where the Tribunal found that it was not satisfied or did not accept that the applicant undertook the duties as purported in the work reference; it reasonably suspected that the work reference provided with the visa application was a counterfeit document. That is, the Tribunal concluded it was a sham document and not genuine because it was said by the Tribunal in this finding that it had been prepared with the intention of deceiving the Department and the Tribunal went on to find that the work reference was a bogus document within the meaning of section 5 subsection 1 of the Act.
23. Having made that finding, the Tribunal concluded that the visa applicant in this particular case had not satisfied public interest criteria 4020 subsection 1. The Tribunal went on to consider whether that public interest criteria 4020 subsection 1 should be waived. There are

certain specified reasons for waiving the requirement of 4020 subsection 1. They are contained in public interest criteria 4020 itself.

24. As noted earlier, the Minister may waive the requirements of 4020 subsection 1. If the Minister was satisfied that compelling circumstances that affect the interests of Australia justified the granting of the visa or if the Minister was satisfied that there were compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen. The Tribunal declined to waive the requirement of public interest criteria 4020 subsection 1.
25. And, as noted earlier, the Tribunal affirmed the delegate's decision not to grant the applicant the relevant visa. In the application that was filed in the court on 11 June 2015 the grounds for judicial review are stated as follows ***"See affidavit attached to this application form"***. The affidavit itself (affirmed by the applicant on 11 June 2015) states:-

"Department of Immigration and Boarder Protection (DIBP) has refused my Visa Application. I did provide the documentation/evidence in support of my work experience but DIBP refused by Visa application. Then I lodged appeal against my Visa Refusal to MRT-RRT. On May – 2015, Migration Review Tribunal-Refugee Review Tribunal (MRT-RRT) has made a decision of my review application (See Attached Annexure A). I MRT-RRT made Judicial Error which needs to be rectified."

26. Now, the applicant provided no further particulars of the so-called judicial error or jurisdictional error. Section 474(2) of the *Migration Act 1958* provides that the decision of the Tribunal is a privative clause decision. Section 474(1) states:-

"474 Decisions under Act are final"

(1) A privative clause decision:

(a) is final and conclusive; and

(b) must not be challenged, appealed against, reviewed, quashed or called in question in any court; and

(c) is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account."

27. It is, of course, the case that a constitutional writ can be issued if it is shown that the decision of the Tribunal was affected by jurisdictional error. The applicant has not been able to demonstrate any jurisdictional error. Indeed, there is no jurisdictional error apparent on the face of the Tribunal's decision. The difficulty that the applicant has, and it is the case unfortunately with many applicants in this jurisdiction, is that the applicant in this case is actually asking this court to review the merits of the decision – but a merits review is not permissible.

28. I note what was stated by the High Court in the *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272 where it was stated:-

“...any court reviewing a decision upon refugee status must beware of turning a review of the reasons of the decision-maker upon proper principles into a reconsideration of the merits of the decision. This has been made clear many times in this Court. For example, it was said by Brennan J in Attorney-General (NSW) v Quin (1990) 170 CLR 1:

“The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative actions, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.”

29. Essentially, for the benefit of the applicant who's here today, when a decision is made by the Tribunal – this Court is not able to look at the merits of what was decided by the Tribunal. On this particular judicial review application the court has not been able to discern any jurisdictional error. The application for judicial review is dismissed with costs.

I certify that the preceding twenty-nine (29) paragraphs are a true copy of the reasons for judgment of Judge Howard

Associate:

Date: 19 December 2016